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ABSTRACT

Perspectives on the relationship of the legal profession to the changing nature of American society are discussed by Attorney General Smith. He proposes the idea that the courts, without constitutional warrant, have struck down actions by legislative bodies and brought about new rights (i.e., government by judicial decree). He suggests that government by judicial decree has promoted the view that the only avenue to justice lies through the courts. An erosion of restraint by the courts has occurred in matters of standing, ripeness, mootness, and political questions. At the same time, there has been an expansion of several doctrines by which state and federal statutes have been declared unconstitutional, in particular, the analyses that have multiplied so-called "fundamental rights" and "suspect classes." In addition, there has been an extravagant use of mandatory injunctions and remedial decrees. The lack of judicial restraint has led to a substitution of judicial judgment for legislative and executive judgment. Lawyers should urge self-restraint upon the courts and nonjudicial routes to justice. Finally, the law school curriculum should include the law and legal institutions of America's founding period. (SW)

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Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

AT THE

THE UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER

GRADUATION CEREMONY

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6:15 P.M. E.D.T.
THURSDAY, MAY 12, 1983
BOVARD AUDITORIUM
UNIVERSITY OF SOUTHERN CALIFORNIA
LOS ANGELES, CALIFORNIA

HE016 353

Thank you, Dean Vice. It is always a pleasure to be in Southern California, and it is a special pleasure to address a graduating class of this distinguished law school.

There is a story told about Oliver Wendell Holmes when he was in his eighties, nearing the end of his distinguished career on the Supreme Court. The great jurist found himself on a train and, confronted by the conductor, he couldn't find his ticket. Recognizing Holmes, the conductor told him not to worry, that he could just send in the ticket when he found it. Holmes looked at the conductor with some irritation and replied:

"The problem is not where my ticket is. The problem is, where am I going?"

Upon discovering your presence in law school, many of you may have wondered, Holmes-like, where you were going. Today you have at least one answer to that question -- you were heading toward the successful completion of three years of law school, toward, in fact, this very day.

This may be an obvious answer, but the three years you have just finished are extremely important. For they represent a ticket of sorts -- a very valuable ticket, one that can gain entry to many interesting and rewarding careers. It is an honor for me to join your families and friends and teachers in congratulating you on your accomplishment.

Law-school graduates typically travel many paths after graduation. Some of you will go into general practice, some into trial work. Some will find yourselves in specialties like patent and tax law. Some of you will practice corporate law in large firms. Some will be lobbyists, using your legal skills to represent a variety of organizations before government. And some of you will wind up in government, perhaps in Washington, in the Department of Justice. A few of you may become judges, a few politicians, and a few may decide to teach future generations of attorneys. Persons trained in the law obviously do a great many things. You rightly should be excited about your prospects, both immediate and long-range.

Today I would like to share with you my thoughts on the relationship of the legal profession to the changing nature of American society.

Governed by the rule of law and devoted to commercial enterprise and the pursuit of happiness, America has always been and will continue to be a litigious nation. That is an abiding characteristic. In the past three decades, however, the citizens of our society have been turning to the courts in unprecedented numbers and for a variety of new reasons. Time magazine says -- I believe correctly -- that in this area of our society "a virtual revolution" has been taking place.

The features of this revolution are plain enough. As never before, courts have been voiding federal and state statutes and discovering numerous new constitutional rights, protections and entitlements. Many Americans, emboldened by huge awards in personal injury suits, have been going to court seeking damages that in previous decades would not have been considered even remotely recoverable.

Meanwhile, federal and state legislatures have been writing laws at unprecedented rates. And administrative agencies have been churning out vast numbers of new regulations. Many of these laws and regulations have become the subjects of litigation.

Civil case filings in all courts, state and federal, trial and appellate, have grown dramatically in the past 30 years. As Erwin Griswold -- former Solicitor General of the United States and former dean of the Harvard Law School -- has pointed out, the belief is now widespread that "every controversy should be resolved in the courts, and every reform should be achieved in the courts."

Chief among the leaders of this revolution have been individuals who have been trained in the law. The growth in the number of individuals studying the law is staggering. Law school enrollments have tripled since 1950, growing at a rate six times faster than that of the general population.

Meanwhile, the work of many lawyers has been changing. If the judicial invalidation of statutes and assertions of policymaking authority have been a conspicuous characteristic of our time, so, too, has the vigor of lawyers in opposing democratic or majoritarian desires and in representing parties whose complaints in another time would have been considered most bizarre.

The question I would like to pose today is whether this revolution, which began before most of you were born, is one we should applaud. I will not try to offer a complete assessment -- that would try the patience of any listener, and indeed any speaker. Instead I will focus on areas that most concern me.

Much of the revolution of the past 30 years has been brought to us by judges and lawyers. On many occasions the courts, without constitutional warrant, have struck down actions by legislative bodies and midwifed new rights. The courts have given us what I call government by judicial decree.

Government by judicial decree is objectionable not on conservative or liberal political grounds, but rather on grounds that it offends the very nature of our constitutional government. To the degree that it invades the legislative function, it displaces representative government.

By wrongly voiding legislative acts and thus usurping power that properly belongs in federal or state or local legislatures, the courts close down, as former Attorney General and Supreme Court Justice Robert Jackson once pointed out, "an area of compromise in which conflicts have actually, if only temporarily, been composed." Furthermore, they impose their own policy choices upon the people affected, whether they are the people of the nation, a particular state, a city or county.

Very often, these choices represent imperfect policy-making. The fact-finding resources of courts are limited. And judges are necessarily dependent on the facts presented to them by the interested parties. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow special interests being urged by parties in a lawsuit. Legislatures have these capabilities precisely because they are so closely related to the people. They have constituencies to which they are directly accountable.

The policy choices of legislatures thus are presumptively better than those of judges. But even if these choices are unwise or poorly considered, they still should be respected by the courts. The courts' review should extend, in the case of constitutional questions, only to the constitutionality of an action or statute, not to its wisdom. In general, the courts should void the policy choices of legislatures only when they contravene clear constitutional principles. U.S. Circuit Court Judge and former Solicitor General Robert Bork put it well when he wrote: "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."

By inviting citizens to forgo elective politics and instead bring lawsuits, government by judicial decree has encouraged acceptance of the view that the only avenue to justice lies through the courts. But that is not accurate. The courts are not the only avenue to justice, or even always the best one. The legislature is quite capable of achieving justice, as witness the enactment of the Civil Rights Act of 1964. Furthermore, contrary to much that is popularly written and said today, the courts, like other branches of government, are quite capable of doing injustice

It was, after all, the Supreme Court which in 1857 declared that Congress lacked the authority to prohibit slavery in the territories. And it was the Supreme Court which, during the first decades of this century, stopped a state legislative effort to ameliorate sweat-shop conditions in the baking industry; invalidated minimum wage and maximum work hour regulations; struck down statutes condemning "yellow dog" contracts; and refused to allow states to restrict entry into the ice business, or to regulate the price of theater tickets or gasoline.

We must always keep in mind, as Justice Holmes once observed, that "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."

Government by judicial decree reflects in large part a failure by the courts to restrain themselves. Recent years have witnessed the erosion of restraint in considerations of justiciability -- in matters of standing, ripeness, mootness, and political questions. Meanwhile there has been an expansion of several doctrines by which state and federal statutes have been declared unconstitutional -- in particular, the analyses that have multiplied so-called "fundamental rights" and "suspect classes." Furthermore, there has been an extravagant use of mandatory injunctions and remedial decrees. Indeed, at times, it has become hard to distinguish courts from administrative agencies; for example, in some cases the courts have taken charge of local sewage systems - and prison systems.

The courts are to a certain degree responsible for the growing caseload that is overwhelming them. The caseload burden has sometimes forced curtailment of oral argument and led to assembly-line procedures for disposing of cases. It has not allowed enough time for reflection or mastery of records. In 1975 Circuit Judge Duniway lamented that he and many of his brothers and sisters on the court "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve."

The lack of judicial restraint has led to a substitution of judicial judgment for legislative and executive judgment. And missing in much of this government by judicial decree has been a proper understanding of the Constitution.

At the Department of Justice, we are urging judicial restraint upon the courts whenever the nature of the issues presented in both practical and constitutional terms require the more considerable resources of a legislature to resolve. We hope that more and more courts will exercise restraint in regard to questions of justiciability, analysis of fundamental rights and suspect classes, and use of mandatory injunctions and remedial decrees.

The principle of restraint needs the support not only of judges but also of lawyers. Lawyers, to be sure, must zealously represent their clients by using every weapon in their arsenal. And lawyers should not be daunted when they lose. Justice Rehnquist, in the Vermont Yankee Nuclear Power case in 1978, was right to excoriate an appellate court for swallowing an argument on a "peripheral issue"; but the lawyers who presented that argument to the court were right at least to try this long shot -- they were discharging their duty to their clients.

Lawyers, however, have obligations outside the courtroom. As citizens and as members of their bar associations, they have an obligation to preserve our form of government, which requires that policy-making authority reside in the elected branches of government, not in the unelected judiciary. As citizens and members of the bar, lawyers should urge self-restraint upon the courts.

Lawyers, by the way, have another obligation that deserves mention. The past 30 years have witnessed increasing acceptance of the view that it is better to go to court than to settle differences privately. To be sure, lawyers must serve their client to the best of their abilities, but lawyers should remember that often the best service they can provide a client is to keep him out of court. It was Lincoln who said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time."

Furthermore, we should be more modest about what lawyers must do. It is hardly obvious that lawyers -- and, for that matter, judges -- need to be involved in every dispute. Such "non-judicial" routes to justice as arbitration, negotiation and administrative process deserve greater employment as alternatives that can complement the judicial systems.

Judges and lawyers are not the only ones deeply involved in the litigious revolution of our times. So, also, are the institutions responsible for their training -- the law schools.

The judicial policy-making of the past three decades has been aided and abetted by the view that the Constitution is simply the precedents to the case at hand. Unfortunately, this view is all too often taught in our law schools. Knowing precedent is of course important, but central to constitutional interpretation should be the text of the Constitution, the intent of the framers, and the historical context of the document.

How often are law students asked to read the Federalist papers or study the records of the Constitutional Convention? How often are they asked to understand separation of powers, as this concept has developed over 200 years? And if these intellectual underpinnings are frequently neglected in law schools, is it any wonder that ultimately they come to be neglected by our lawyers in argument, and our judges in their decisions, and indeed by our citizens in their understanding of the law that binds, or should bind, us together? There is perhaps no more compelling need in legal education today than instruction in the law and legal institutions of our founding period.

Law schools reflect the intellectual currents of the age, and the ones of our time happen to be positivism and instrumentalism. These philosophies are rarely made explicit. But in the phrase of former Assistant Attorney General Roger Cramton, now Dean of the Cornell Law School, they are "part of the intellectual woodwork of the law school classroom."

This silent woodwork is an amazingly effective professor. It teaches a student to believe that all things are relative (except of course relativism itself), and to view law merely as a tool to achieve whatever one wants. There are no right answers for many students; just winning arguments.

Law schools today would be well advised to examine the intellectual woodwork of their classrooms. Law is not merely instrumental, a device to enable you to get what you want, a technique that can be manipulated according to the end sought. Law is not a means of gratifying one's wants.

What must be understood today is that law has an inner morality that protects us all. Alexander Bickel called it the "morality of process." It is found in legal technicalities -- what Bickel called "the stuff of law." Government by judicial decree has denied the morality of process and thus the importance of legal technicalities. As Bickel noted of the Warren Court, it "took the greatest price in cutting through legal technicalities, in piercing through procedure to substance." If we are to preserve our form of government, it is the stuff of law that must be taught to and respected by the students who will soon enough become the nation's lawyers and judges.

I realize that today I have been a little rough on the legal profession. Let me assure you that I dissent from Shakespeare: I am not about to suggest that we kill all the lawyers, or the judges, or the law professors, and certainly not law school students. But I believe that the revolution of our times is something all of us trained in the law must be concerned about.

For not only have we become too concerned with courts and too inattentive to how we can govern ourselves through the elective branches. And not only have we failed to see how the very organization of our government works to preserve liberty and equal rights for all. Our preoccupation with litigation also has caused us to neglect something most fundamental.

Writing in Federalist 55, James Madison said that our form of government "presupposes," to a higher degree than other forms of government, the existence of certain qualities of human nature. These qualities include prudence, civility, honesty,

moderation, a concern for the common good -- in short, what Madison and his colleagues called virtue. "To suppose that any form of government will secure liberty or happiness without any virtue in the people," said Madison at the Virginia Convention in 1788, "is a chimerical idea."

The revolution I have described today has not only failed to nourish these values, it has also weakened them. We have become impatient with the voluntary morality of life in society and grown to prefer the compulsory morality of the courtroom. We have become accustomed to thinking about and demanding our rights in courts of law, and neglecting our responsibilities to our families and neighbors and institutions. We have put our faith in courts of law, and law itself, to make us good men and women, and indeed to set the world aright.

But the legal order cannot by its mere existence in code, law, and document nourish the values upon which it rests and depends. Civility cannot be litigated into being; and decency and responsibility cannot be the products of legislation or bureaucratic fiat. Knowledge of law and legal experience do not make men and women good.

Walter Lippman once wrote that "the acquired culture is not transmitted in our genes and so the issue is always in doubt." Let me emphasize that neither is the acquired culture transmitted, at least in its most important form, in courts of law. As Judge Learned Hand once said, "A society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

I wish you the best in your legal careers. But I leave with you the thought that your most important contribution to this society will be less what you do as a lawyer than what you do as a citizen in transmitting the acquired culture on which our society and form of government depend. And I offer you a challenge: that what you do as a mother or a father, a volunteer or a neighbor, may in the final analysis be your best and finest service to America.

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